

Appeal from decision of the California State Office, Bureau of Land Management, dismissing protests from the issuance of temporary use permit CA-060-TU7-50 and proposed issuance of right-of-way CA 4874.

Affirmed in part and reversed in part.

1. Federal Land Policy and Management Act of 1976: Permits

Temporary use permits for purposes associated with rights-of-way issued under sec. 501 of the Federal Land Policy and Management Act of 1976, may only be issued pursuant to sec. 504(a) of that Act.

2. Federal Land Policy and Management Act of 1976: Permits

The provisions of sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(a) (1976), do not authorize the issuance of temporary use permits either as a preconstruction permit absent an existing right-of-way or for use as a transmission site right-of-way.

3. Administrative Practice -- Bureau of Land Management -- Rules of Practice: Appeals: Generally -- Rules of Practice: Protests

The filing of a timely protest suspends the authority of the State Office to act upon the matter until the protest has been ruled upon. Further, action is to be additionally suspended after a ruling on the protest for the period of time in which a person adversely affected may file a notice of appeal therefrom.

4. Federal Land Policy and Management Act of 1976: Rights-of-way -- Rules of Practice: Appeals: Generally -- Rules of Practice: Protests

Where, on appeal from the denial of a protest to the issuance of a right-of-way, an appellant does not show that issuance of the right-of-way was contrary to the law or applicable regulations, a decision rejecting the protest will be affirmed.

APPEARANCES: Lawrence W. Campbell, Esq., San Diego, California, for appellant; Kenneth D. Polin, Esq., Gray, Cary, Ames & Frye, San Diego, California, for intervenor Francis H. Gifford, President, Gifford Engineering, Inc.; Walter F. Holmes, Chief, Division of Technical Services, California State Office, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James W. Smith has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated January 12, 1979, dismissing appellant's protests from the issuance of temporary use permit CA-060-TU7-50 (TUP) to Francis H. Gifford, President of Gifford Engineering, Inc. (Gifford), for a temporary communication facility on Federal lands atop Otay Mountain and the proposed issuance of right-of-way CA 4874 to Gifford for a permanent communication facility on the same site. In conjunction with the decision, right-of-way CA 4874 was issued to Gifford. The subject site is situated in the NE 1/4 SW 1/4 NE 1/4 sec. 23, T. 18 S., R. 1 E., San Bernardino meridian, San Diego County, California.

Pending the resolution of this appeal the Chief, Division of Technical Services, California State Office, BLM, has requested that the decision appealed from be placed in full force and effect. As we here decide the matter of the appeal, the request is denied.

We will discuss issues with respect to the TUP's and the proposed right-of-way under the respective headings herein.

Temporary Use Permit

A temporary use permit was first issued to Francis H. Gifford, President of Gifford Engineering, Inc., for the period from October 10, 1977, to October 9, 1978, for a "Temporary Communication Site" on Otay Mountain pursuant to section 504(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(a) (1976). On October 10, 1978, another TUP was issued to Gifford, CA-060-TU8-88, which was terminated upon the issuance of the right-of-way.

Appellant objected to issuance of the TUP because: 1) an opportunity for a hearing was not afforded to interested parties pursuant to Organic Act Directive 77-74 (October 6, 1977) prior to issuance of the permit; 2) procedures for development of an Environmental Analysis Record (EAR) and Land Report pertaining to the use of Otay Mountain for communication site rights-of-way, as outlined in BLM Manual 1790-1791 and 2061, were not followed; 3) issuance violated appellant's valid existing right protected by section 701(a) and (h) of FLPMA, 43 U.S.C. § 1701 (1976); 4) issuance violated Organic Act Directive 76-15 (December 14, 1976), BLM Manual 2920.01-2920.06 and 43 CFR 2920.0-2; and 5) the terms of the TUP have been violated as regards construction of an access road, use of excess area, and occupation by secondary users. ^{1/}

Organic Act Directive 77-74 provides in part for a 10-day period of administrative review, during which comments by interested parties may be filed, regarding any BLM decision authorizing a use permit for Federal lands. Nevertheless, as pointed out by BLM in its January 12 decision, this directive contained draft regulations and, as such, was not binding. Indeed, there is nothing in the statute or the outstanding regulations pertaining to the issuance of use permits that requires that an opportunity for a hearing be afforded prior to issuance of the permit. See 43 U.S.C. § 1732(b) (1976); 43 CFR 2920.

Regarding preparation of the EAR and Land Report pertaining to communication site rights-of-way on Otay Mountain, the substance of appellant's objection appears to be that "consideration was [given] to the flora and fauna on Otay Mountain" and not to the problems of other right-of-way holders in their use of the "radio spectrum." As will be mentioned in regard to the proposed Gifford right-of-way, matters concerning the "radio spectrum," e.g., use of available frequencies and electromagnetic interference among communication facilities, must be resolved by the communication licensing agency of the Federal Government, the Federal Communications Commission (FCC). See Act of June 19, 1934, as amended, 47 U.S.C. § 151 (1976). Otherwise, comment from other right-of-way holders was solicited in regard to preparation of the EAR and Land Report. See EAR, p. 53. Furthermore, a management plan for the development of Otay Mountain was discussed at a meeting conducted by BLM in San Diego, California, on December 22, 1976. A "final draft" was submitted to right-of-way holders, including appellant, and comments were solicited. See letter from Barry H. Ashworth, Acting Area Manager, El Centro Resource Area, BLM, dated

^{1/} While the protest to the issuance of the TUP may be considered to be moot, since the TUP has already expired, in view of the importance which this question may have for future actions involving not only the appellant, but also TUP's in general, we will examine the contentions of the appellant on this matter.

January 7, 1977. Moreover we can detect no area, nor has appellant pointed out any specific areas, in which the EAR and Land Report deviated from the "guidelines" found in the BLM Manual sections 1790-1791 and 2061.

Appellant additionally argues that its valid existing right on Otay Mountain in the form of a neighboring communication site right-of-way LA 0163131 has been adversely affected by issuance of the TUP. The pertinent savings provision of FLPMA, supra, section 701(h), provides that: "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." There is, however, no evidence, other than appellant's naked assertion, that appellant's right-of-way has been affected by issuance of the Gifford TUP. Therefore, issuance of the TUP did not violate section 701(h) of FLPMA, supra.

[1] As regards a possible violation of Organic Act Directive (OAD) 76-15 (December 14, 1976), we note that the two TUP's involve different problems. The OAD provides that TUP's can only be issued, as regards rights-of-way, in conformity with section 504(a) of FLPMA, 43 U.S.C. § 1764(a) (1976). It also specifically notes that section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1976), is applicable for land uses not associated with rights-of-way. In a memorandum to the State Director, dated December 19, 1977, the Riverside District Manager stated in reference to CA-060-TU7-50 that "the TUP was issued pursuant to the authority in FLPMA (P.L. 94-579 Sec. 302(b)). The intent is clearly stated in the recommendation section (page 4) of the attached Land Report."

OAD 76-15 is clearly correct when it states that all TUP's for uses associated with rights-of-way must be issued pursuant to section 504 of FLPMA, and thus, it was error to issue the instant TUP pursuant to section 302(b), and we so hold. Temporary use permit CA-060-TU-8-88, however, was issued pursuant to both section 302(b) and section 504(a). Whether section 504(a) supports the issuance of the TUP is a matter which we will examine infra.

[2] We next turn to whether issuance of the TUP violated 43 CFR Part 2920. Those regulations provide, in part, that use permits will be issued "for special purposes not specifically provided for by existing law." 43 CFR 2920.0-2. Furthermore, permits will not be issued "in any case where the provisions of any law may be invoked." Id. Since section 501 of FLPMA, 43 U.S.C. § 1761 (1976) clearly provided for issuance of rights-of-way for communications sites, the question is whether, within the confines of the existing regulations, issuance of the TUP was authorized.

In this regard, we would note that the State Office, in its decision denying appellant's protest argued: "Protestant quotes 43 CFR 2920 to support his case that regulations were violated. The Federal

Land Policy and Management Act of 1976 has given new statutory authority to issue such permits, and it in fact repealed the statutory authority under which the 2920 regulations were based."

We would point out, initially, that if the State Office is contending that 43 CFR Part 2920 has effectively been repealed by FLPMA its position would not only contradict OAD 76-15, but would preclude the issuance of any TUP's until such time as proper regulations were promulgated. OAD 76-15 expressly noted that until specific regulations were adopted, all TUP's were to be issued pursuant to the regulations in Part 2920. See also section 310 of FLPMA, 43 U.S.C. § 1740 (1976). Moreover, while FLPMA did repeal some of the statutory basis for Part 2920, it did not repeal a number of other acts upon which the Department had premised its authority to issue use permits. See, e.g., 43 U.S.C. §§ 1, 2, 1201 (1976). In any event, Federal policy animating the employment of special land use permits was not derived from any specific statutory provision. See Allen M. and Margery D. Boyden, 2 IBLA 128 (1971); Claude M. Bowlin, 1 IBLA 32 (1970). Rather, it was based on the general authority of the Secretary of the Interior to administer the public lands. F. Lowell Ruby, A-30623 (January 18, 1967). This general authority has not been altered by the passage of FLPMA. We can find no support for the bald proposition that FLPMA revoked Part 2920, and we expressly reject such a construction of FLPMA.

Traditionally, the authority of the Department to issue TUP's, formerly referred to as "special land use permits" (SLUP's), was limited to those situations where the provisions of existing public land laws could not be invoked. In Leases and Revocable Licenses on Oregon and California Revested Lands for Recreational Purposes, 59 I.D. 313 (1946), the Solicitor of the Department examined the question whether the Secretary "has the 'basic authority' to issue revocable licenses for a certain use only if there is no statute at all relating to that particular type of use, or whether he may issue such licenses, despite the existence of a specific statute governing that type of use, as long as the particular applicant cannot qualify under the statute." Id. at 315. See generally, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973).

In concluding that the Secretary was possessed of the basic authority to issue SLUP's in both situations, the Solicitor noted:

The authority to issue such permits is not limited to situations where there is no statute at all governing the particular type of use. In the absence of a congressional intent to preclude the issuance of any special land-use permits with respect to a particular kind of use, there is no basis for thus narrowing the executive authority to issue permits.

Id. at 316. Thus, the Solicitor concluded a recreational lease issued to a State or a municipality must be issued pursuant to the Act of April 13, 1928, 45 Stat. 429, 43 U.S.C. § 869a, while an individual could acquire a SLUP for that purpose since such an individual could not acquire a lease pursuant to the 1928 Act.

It is clear, however, that neither situation is presented in the instant case, since Gifford could clearly qualify for the right-of-way. Thus, under the traditional manner of examining the applicability of 43 CFR Part 2920, issuance of the TUP would be in error.

There is, however, a more intricate problem associated with this question. The whole purpose for limiting the availability of use permits to those situations in which the provisions of the law were inapplicable, was to avoid authorizing, through the mechanism of a use permit, actions which Congress had either sought to prohibit or regulate in a detailed manner. See generally, Wilderness Society v. Morton, supra. The question is whether Congress has sought to prohibit issuance of a TUP for the uses involved herein.

We note that the provisions of section 504(a) do not authorize the issuance of a TUP either as a preconstruction permit absent a pre-existing right-of-way or for use as a transmission site right-of-way. Section 504(a) provides:

The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. Each right-of-way shall be limited to the ground which the Secretary concerned determines (1) will be occupied by the facilities which constitute the project for which the right-of-way is granted, issued, or renewed, (2) to be necessary for the operation and maintenance of the project, (3) to be necessary to protect the public safety, and (4) will do no unnecessary damage to the environment. The Secretary concerned may authorize the temporary use of such additional lands as he determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto. [Emphasis supplied.]

While the Secretary is authorized to issue TUP's in connection with a right-of-way, the fact that his authority is statutorily constrained to the issuance of TUP's for "additional lands" clearly prevents the utilization of TUP's to accomplish purposes for which a right-of-way may issue. The authorized use for the TUP's herein was clearly a matter which was properly the subject of a right-of-way. Thus, we hold that it was error to issue the TUP's to Gifford. In view of our holding on this issue we will not discuss appellant's contentions that Gifford violated the terms of the TUP and that the TUP should have been cancelled therefor.

[3] Prior to examining appellant's objections to the issuance of the right-of-way, we wish to make it clear that BLM did not follow proper procedures in adjudicating the protest to the issuance of the right-of-way.

As this Board has held on numerous occasions the filing of a timely protest suspends the authority of the State Office to act upon the matter until the protest has been ruled upon. Duncan Miller (On Reconsideration), 39 IBLA 312 (1979); California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977). Further, action is to be additionally suspended after a ruling on the protest for the period of time in which a person adversely affected may file a notice of appeal therefrom. Duncan Miller, supra; D. E. Pack, 31 IBLA 283 (1977).

In the instant case, appellant's protest to the issuance of the right-of-way was denied on January 12, 1979. Right-of-way CA 4874, which was the subject of the protest, issued on that date, and was immediately effective. Issuance of the right-of-way should have been suspended for the period in which the protestant could file a notice of appeal. It was error to issue the right-of-way on the same day that the protest was denied. 2/

2/ We wish to point out, in reference to the motion that we put the decision below into effect during the pendency of the appeal, that the precipitous issuance by BLM of the right-of-way may have prevented the normal stay in the effect of the decision appealed from. The applicable regulation, 43 CFR 4.21(a), provides:

"Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal * * *." (Emphasis added).

Section 506 of FLPMA provides, in part:

"Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation of the Secretary concerned may be grounds for suspension or termination of the right-of-way if, after due notice to the holder of the right-of-way and, and [sic] with respect to easements, an appropriate administrative proceeding pursuant to section 554 of Title 5, the Secretary concerned determines that any such ground exists and that suspension or termination is justified * * *." 43 U.S.C. § 1766 (1976). When the right-of-way is issued as an eo instante grant, assuming without deciding that it would be considered an "easement," there is grave question whether or not the exception provided by 43 CFR 4.21(a) is controlling. If it were deemed to be controlling the appeal would not stay the effect of the decision. In view of our determination herein, we do not now decide this question. We raise this matter, however, to place the various officials of BLM on guard against repetition of this type of action in the future.

Right-of-Way

[4] Appellant objected to the issuance of a right-of-way because: 1) an opportunity for a hearing was not afforded to interested parties pursuant to Organic Act Directive 77-74 (October 6, 1977) in conjunction with BLM consideration of the Gifford application; 2) issuance violated appellant's valid existing right protected by section 701(h) of FLPMA, supra; 3/ 3) the application did not contain sufficiently detailed information as to site plans which would permit appropriate protests to be made; 4) issuance would result in electromagnetic interference among communication facilities atop Otay Mountain and decrease the number of available frequencies per facility; 5) Gifford should have been required to withdraw his transfer application RO-5105 for another site; 6) the communication site should be located 3,000 feet from any present site; 7) the right-of-way should contain a stipulation that it is not to be used by anyone other than the applicant; and 8) the right-of-way should contain a stipulation that the applicant rectify any electronic interference problems with other facilities caused by his communication facility.

Organic Act Directive 77-74 has no application to rights-of-way. It pertains to the issuance of use permits and leases pursuant to section 302(b) of FLPMA, supra. Moreover, there is no requirement in the statute or regulations that a hearing be afforded interested parties prior to issuance of a right-of-way. See 43 U.S.C. Subchapter V Rights-of-Way (1976); 43 CFR Group 2800. We note though that appellant obtained a "Notice of Site Availability," dated September 12, 1978, wherein BLM notified him that Gifford had applied for a right-of-way and solicited comments thereon.

As regards appellant's valid existing right in the form of neighboring communication site right-of-way LA 0163131, there is no evidence this would be affected by issuance of the Gifford right-of-way. Issuance would not violate section 701(h) of FLPMA, supra. To the extent that this argument relates to possible electromagnetic problems, it is addressed infra.

Regarding the specification of site plans in the application, the pertinent statutory provision, 43 U.S.C. § 1761(b)(1) (1976), requires that the applicant disclose

those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right of way, including its effect on competition, which
* * * [the Secretary] deems necessary to a determination,

3/ Appellant also invoked sections 509(a) and 701(a) of FLPMA in regard to this objection. Those sections provide that nothing in FLPMA shall be deemed as having the effect of terminating any right-of-way or valid existing right, respectively.

in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

It is clear, therefore, that an applicant must disclose, to a degree, the details of his intended use; but, as the second half of the provision sets out, only as it bears on the Secretary's decision as to whether to issue the right-of-way and the terms and conditions to be imposed. In this regard it should be noted that the matters appropriate to Secretarial consideration are somewhat circumscribed.

Appellant's principal concern is that without specific information "no intelligent determination can be made as to whether or not possible frequency problems or electromagnetic incompatibility may be created, in order that appropriate protests can be made to the Federal Communications Commission." As appellant admits, however, questions of the use of available frequencies and electromagnetic interference are for the FCC. Such questions are to be resolved prior to issuance of a right-of-way, Northwestern Colorado Broadcasting Company, 18 IBLA 62 (1974), but information pertaining to such problems need not be provided in the right-of-way application. Otherwise, an applicant need only provide "the minimum amount of information essential for making the determinations required by law." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Ad. News 6175, 6194. There is nothing in the record to indicate that the applicant failed to provide this information.

Similarly, we will not deal directly with questions as to electromagnetic interference and the decrease in the number of available frequencies. Northwestern Colorado Broadcasting Company, supra. As the January 12 BLM decision points out, this Department's concern is with "environmental impacts and proper land use and management."

Appellant's other objections can be dealt with in rapid succession. As BLM pointed out in its January 12 decision, regardless of what appellant may have been informed in the past, nothing in FLPMA, supra, or the regulations, precludes issuance of more than one right-of-way to the same party. Furthermore, there is no requirement that communication sites be located 3,000 feet apart. To the extent that this question relates to the question of electromagnetic interference it is properly taken up with the FCC.

Appellant also argues that the right-of-way should have contained a stipulation prohibiting use of the site by anyone other than the applicant. Appellant claims that he alone was granted a "quasi public service" right-of-way in order to provide a communication site for multiple users atop Otay Mountain and that this was to be recognized in subsequent rights-of-way. There is nothing in the statute or the

regulations prohibiting secondary use of a particular site. Furthermore, there is nothing in appellant's right-of-way dictating the provisions of future rights-of-way on Otay Mountain in this regard. See James W. Smith, 34 IBLA 146 (1978). The only pertinent regulation, 43 CFR 2802.4-1, requires BLM approval for the transfer of a right-of-way. Secondary use is not prohibited thereby but BLM approval must be obtained. See James W. Smith, supra.

Regarding appellant's contention that the right-of-way also should have contained a stipulation requiring the applicant to rectify any electronic interference problems caused by his facility, as noted above, this matter is properly brought to the attention of the FCC.

Finally, appellant has requested a hearing in this matter. Where the legal conclusions reached in a decision are based on undisputed facts and there has been no proffer of further facts which could compel different legal conclusions, a request for a hearing will be denied. Floyd L. Anderson, Sr., 41 IBLA 280 (1979). This is the situation here. Accordingly, the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as regards the issuance of the TUP's and affirmed as regards issuance of the right-of-way.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

